04-13142-FF

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PHILLIP A. JONES SR.
Plaintiff-Appellant,

v.

Fulton County Government,
Appellee.

December 14, 2004, Decided

COUNSEL:

Phillip A. Jones, Pro Se Counsel, Administrator and Fulton County Official resolving protocol violations within the State of Georgia Dispute Resolution Programs and Fulton County Government. Initial violations resulted at the first stage of the grievance policies and procedures and continued to the Federal Courts.

Rolesia Butler Dancy, Senior Attorney & Carmen Alexander, Staff Attorney, Fulton County Government Attorneys.

JUDGES :

Before: TJOFLAT, DUBINA AND BLACK, Circuit Judges

PER CURIAM:

Phillip A. Jones, Sr. appeals the district court's (1) grant of summary judgment to Fulton County Government in his lawsuit alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and Age Discrimination in Employment Act, 29 U.S.C., et seq., and (2) denial of his various motions for injunctive relief.

Jones raises numerous issues on appeal, none of which have merit. We address these issues in turn.

I. Discussion

A. *Statement of Fact to Which There is No Cause for Doubt*

Jones first argues the district court erred by not address his :Statement of Fact to Which There is No Cause for Doubt." He asserts that he complied with Northern District of Georgia' Local Rule 56.1(B)(3).

Local Rule 56.1B(2) provides that "[t]he respondent to a motion for summary judgment shall attach to the response separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondents statement shall be deemed to have been admitted." Further, Local Rule 56.1B(3) requires that "[a]ll documents and other record materials relied upon by a party moving for or opposing a motion for summary judgment shall be clearly identified for the court.

The district court did not err by finding Jones had admitted most of Fulton County" factual assertions in its statement of material facts. Although Jones attached to his response to Fulton County's motion for summary judgment a separate statement of material facts, he, in most instances, provided narrative explanations and failed to clearly identify the evidence that he was relying on to support his rebuttal to Fulton County's factual assertions. According, under Local Rule 56.1.B(2), he admitted most of Fulton County's factual assertions.

B. Objections to Magistrate's R&R

Jones next argues the district court erred by not considering his objections to the magistrate's R&R within its opinion.

The record refutes Jones' argument the district court failed to consider this objections to the magistrate's R&R. In its order, the district court noted Jones had filed objections to the magistrate's R&R. After stating it had reviewed the record, the district court adopted the magistrate's R&R as its opinion.

C. Exhaustion of Administrative Remedies

Jones also argues he exhausted his administrative remedies within respect to his race discrimination claim because this claim grew out of his Previous EEOC charge since the same individuals have continued to discriminate against him.

As a prerequisite to bringing suit under Title VII charge of discrimination within 180 days of the last act of

discrimination. *Jones v. Dillard's, Inc., 331 F. 3d 1259, 1263 (11th Cir. 2003)(ADEA); Wilkerson v. Grinnell Corp., 270 F. 3d 1314, 1317 (11th Cir. 2001) (Title VII).* The crucial element of the EEOC charge is the factual statement it contains. *Sanchez Brands, Inc., 431 F.2d 455, 462 (5th Cir. 1970).* A complainant is required to allege in the EEOC charge facts sufficient to trigger an investigation. Id. While the scope of an EEOC charge should not be strictly interpreted, "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Id. at 465-66. The plaintiff has the burden of establishing that he filed a timely charge of discrimination. see *Jackson v. Seaboard Coast Line R. Co., 678 F. 2d992, 1010(11th Cir. 1982) (stating if the defendant denies the plaintiff has met all the preconditions of suit under Title VII, the plaintiff must prove the challenged preconditions were satisfied).*

The district court did not err in finding Jones' race discrimination was barred due his failure to exhaust his administrative remedies. Jones failed to file a charge of discrimination within 180 days of the alleged discriminatory act, his 1997 reclassification to the position of Administrative Coordinator II.

D. Sexual Harassment

Jones also argues he demonstrated evidence of Fulton County's misconduct with respect to his sexual harassment claim. He contends the cases cited by the district court were inapplicable because they did not involve the same style of sexual harassment or assault.

"To establish a prima facie case of hostile work environment sexual harassment, [the plaintiff] must show:(1) that [he] belongs to a protected group; (2) that [he] has been subject to unwelcome sexual harassment; (3) that the harassment was based on [his] sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment; and (5) a basis for holding the employer liable." *Watson v. Blue Circle, Inc. 324 F.3d 1252 (11th Cir. 2003) (quotation marks and citation omitted).* The fourth prong of the hostile work environment test contains both a subjective element and an objective element. *Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999) (en banc).* In order to meet the fourth prong of the test, the employee must "subjectively perceive" the harassment as severe and pervasive enough to change the conditions of her employment. Id. However, in order for the plaintiff to establish a hostile work environment, the district court also must find that this perception was objectively reasonable. Id. In making this objective determination, the district court must consider: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. "Id. The court should consider the conduct in context, not as isolated acts, and consider the totality of the circumstances. Id.

The Supreme Court has noted that a recurring point in Title VII opinions is that "teasing, offhand comments, and isolated incidents" will not amount to discriminatory charges in the terms and conditions of employment. *Faragher v. City of Baca Raton, 118 S. Ct. 2275, 2283 (1998).* In Mendoza,

harassment were not sufficiently severe or pervasive to alter the terms and conditions of her employment even though her supervisor (1) had told her, "I'm getting fired up;" (2) had rubbed his hip against her hip while touching her shoulder and smiling on one occasion; (3) had made sniffing sounds while looking at her groin area on two occasions and had sniffed without looking at her groin on one occasion; and (4) had "constantly" followed her and stared at her in a "very obvious fashion." *Mendoza, 195 F.3d at 1247.*

The district court did not err granting summary judgment to Fulton county of Jones' sexual harassment claim because Jones failed to establish a prima facie case of hostile work environment sexual harassment. Jones did not demonstrate the Bey's sexual harassment was sufficiently serve or pervasive to alter the terms and conditions of his employment and created a discriminatorily abusive working environment. First, although the conduct alleged was objectively humiliating, it is undisputed that it was infrequent, occurring once. The infrequency of the conduct in this case is in stark contrast to the multiple incidents alleged in *Mendoza*, and the conduct alleged in *Mendoza*, which is similar in nature of the conduct alleged in this case was not sufficiently severe or pervasive to alter the terms and conditions of employment. Second, although Jones claimed that contact with Bey was unavoidable following the incident due to the small size of the Alpharetta office, Jones produced no evidence demonstrating how this incident interfered with his job performance.

E. Retaliation

Jones next argues he has demonstrated that Fulton County engaged in retaliatory practices that resulted in age discrimination through a "policy of racialism."

"To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some casual relation between the two events." *Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001) (quotation marks and citation omitted).* Protected expression involves opposing an employment practice made unlawful under Title VII or charging, testifying, assisting, or participating in a Tile VII investigation, proceeding, or hearing. 42 U.S.C. § 2000e-3(a). Statutorily protected expression includes internal complaints of harassment to superiors. *Pipkins v. City of Temple Terrace, Fla., 267 F.3d 1197, 1201 (11th Cir. 2001).* "An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee."*Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (quotation marks and citation omitted).* In order to satisfy the third element of the retaliation test, the plaintiff must show that (1) the person responsible for the adverse action was aware of the protected conduct, and (2) the protected activity and the negative action were "not wholly unrelated." *Bass v. Board of County Comm'rs, Orange County, Fla., 256 F.3d 1095, 1119 (11th Cir. 2001).* "Once a plaintiff has established a prima facie case, the employer then has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. "Pennington, 261 F.3d at 1266. If that burden is met, the

plaintiff bears the ultimate burden of proving, by a preponderance of the evidence, that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. Id.

The district court did not err by granting summary judgment to Fulton County on Jones's retaliation claim. Although the nature of Jones's retaliation claim is not entirely clear, to the extent that Jones is claiming that it is based on his design of the Department of Environment or his managerial performance, Jones has failed to explain how these actions were statutorily protected expressions or what adverse employment action he suffered. Further, to the extent Jones claiming Fulton County retaliated against him for filing grievances regarding his reclassification by not promoting him, Fulton County established a legitimate, non-discriminatory reason for not selecting Jones, Jones failed to establish that his proffered reason was pretextual.

F. Age Discrimination

Jones also argues he has established his claim of age discrimination because he presented evidence that younger employees with less than five years of experience were hired instead of him. He also claimed that one of his interviewers for the Director of Clean and Beautiful told him that he was "too old" for the position, as were his ideas.

The ADEA makes it "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a)(1). "[T]he plaintiff's age must have actually played a

role in the employer's decision making process and had a determinative influence on the outcome." *Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2105 (2000) (quotation marks and citations omitted).*

A plaintiff may establish a claim of discrimination under the ADEA by using either direct or circumstantial evidence of discrimination, or by statistical proof. *See Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993).* Direct evidence of discrimination is evidence that, if believed, would prove the existence of a fact in issue without inference or presumption. Id. Only the most blatant remarks, whose intent could be nothing other than to discriminate constitute direct evidence of discrimination. *Bass, 256 F.3d 1105.* "[T]he evidence must indicate that the complained-of employment decision was motivated by the decision-maker's [prejudice]." *Damon v. Fleming Supermarkerts of Fla., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (emphasis in original).* "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Bass,* 256 F. 3d at 1105 (quotation marks and citation omitted). "[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination." *Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).* "If the plaintiff presents direct evidence that a discriminatory animus played a significant or substantial role in the employment decision , the burden shifts to the employer to show that the decision would have been the same absent discrimination." *Eskra v. Provident Life & Accident Ins. Co., 125F.3d 1406, 1411 (11th Cir. 1997).*

Even if the comment that Jones was "too old" for the position of Director of Clean and Beautiful is direct evidence of discrimination, the district court did not err by granting summary judgment. Fulton County a legitimate, nondiscriminatory reason for not selecting Jones for the position of Director of Clean and Beautiful. Specially, the descisionmaker selected another applicant who he believed would perform well in the position, and he did not believe that Jones would perform well due to his lack of experience. Jones failed to present any evidence demonstrating that Fulton County's proffered nondiscriminatory reason for not selecting him was a pretext for discrimination.

G. Injunctive Relief

Jones next argues he established the four requisites for injunctive relief. We review a district court's denial of a preliminary injunction for abuse of discretion, but does not review the intrinsic merits of the case. Haitian Refugee Center, Inc. v. Christopher, 43 F.3d 1431, 1432 (11th Cir. 1995). "Only where the district court misapplies the law will we refuse to defer to its conclusions supporting its denial of relief." Id. "A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. "Siegel v. Lepore, 234 F3.d 1163, 1176 (11th Circ. 2000) (citations omitted).

The district court did not abuse its discretion by denying Jones' various motions for injunctive relief because he failed to satisfy any of the requirements for relief.

II. CONCLUSION

Upon review of the record on appeal an upon consideration of the parties briefs, we discern no reversible error. Accordingly, we affirm the district Court's grant of summary judgment to Fulton County and denial of Jones' various motions for injunctive relief..

AFFIRMED.